

DIRECT TESTIMONY OF
PHILIP T. LACY
ON BEHALF OF
LILY SOLAR, LLC
DOCKET NO. 2016-89-E

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. Philip T. Lacy, South Carolina School of Law, Columbia, South Carolina 29208.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. University of South Carolina, School of Law, Full Professor of Law.

Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?

A. Duke University, B.A., with distinction, 1969; University of Virginia School of Law, LLB 1972; Order of the Coif.

Q. WHAT OTHER POSITIONS HAVE YOU HELD AT THE UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW

A. I have held the following positions at the University of South Carolina School of Law: Assistant Professor 1975-1980; Associate Professor 1980-1991; Professor 1991-Present; Associate Dean for Administration 1990-1992; Associate Dean for Academic Affairs 1992-2005; and Interim Dean 2006.

1 **Q. BESIDES SERVING AS A PROFESSOR OF LAW, ARE YOU ALSO ADMITTED**
2 **TO PRACTICE LAW, IN THE STATE OF SOUTH CAROLINA?**

3 **A.** I was admitted to practice in Virginia in 1972, in the District of Columbia in 1973, and
4 South Carolina in 1988. I am currently a Member of the South Carolina Bar and an
5 Associate Member of the Virginia Bar.

6
7 **Q. HAVE YOU PREVIOUSLY BEEN QUALIFIED AS AN EXPERT WITNESS,**
8 **BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA?**

9 **A.** Yes. I had the privilege of appearing before this Commission in Docket 1995-1202-E,
10 having been qualified as an Expert Witness in the area of South Carolina Contract Law.

11
12 **Q. HAVE YOU ALSO PREVIOUSLY BEEN QUALIFIED AS AN EXPERT**
13 **WITNESS, BEFORE THE CIRCUIT COURTS, IN THE AREA OF**
14 **COMMERCIAL LAW, IN SOUTH CAROLINA?**

15 **A.** Yes.

16
17 **Q. HAVE YOU BEEN PUBLISHED, IN THE AREA OF CONTRACT LAW?**

18 **A.** Yes. I co-authored Volume 1 of Uniform Commercial Code Transaction Guide: Analysis
19 and Forms, addressing contracts for the sale of goods under Article 2 of the UCC.

20
21 **Q. DO YOU HAVE A CURRENT CURRICULUM VITAE?**

22 **A.** Yes. I have attached a copy hereto as Exhibit, "PTL-1".
23

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. I was asked to review the documents, correspondence, Agreements, electronic mail and facts of this matter, to determine if a Contract was formed and a Legally Enforceable Obligation occurred, between Lily Solar, LLC and SCE&G, based on those facts.

Q. AFTER YOUR REVIEW, DO YOU HAVE AN OPINION, AS TO WHETHER A CONTRACT WAS FORMED AND A LEGALLY ENFORCEABLE OBLIGATION OCCURRED? IF YES, PLEASE EXPLAIN YOUR ANSWER.

A. Yes. In my opinion Lily Solar and SCE&G entered into a contract that required SCE&G to process Lily Solar's Interconnection request under SCE&G's then posted Large Generator Interconnection Procedures ("LGIP"). This contract was formed by an oral agreement reached at the initial scoping meeting on March 3, 2015. In exchange for SCE&G's promise to follow its LGIP, Lily Solar committed to sell its full output to SCE&G, thereby creating a legally enforceable obligation. This contract is evidenced by the parties course of performances in executing an Interconnection System Impact Study Agreement and an Interconnection Facilities Study Agreement that incorporated and complied with the requirements of SCE&G's LGIP.

In my opinion, Section 11.1 of the LGIP, obligated SCE&G to tender Lily Solar a draft Large Generator Interconnection Agreement ("LGIA"), together with draft appendices. Moreover, Section 11.1 of the LGIP, further provided that the draft LGIA that SCE&G was required to tender "shall be in the form of Transmission Providers [SCE&G's] FERC approved standard form LGIA, which is in Appendix 6 [to the LGIP]."

1 The Interconnection Agreement that SCE&G tendered to Lily Solar did not conform
2 SCE&G's standard form LGIA. For example, the tendered Interconnection Agreement
3 provided a one year suspension period, while SCE&G's LGIA provided a three year
4 suspension period. As a result, by tendering the non conforming interconnection
5 agreement SCE&G breached its obligation under Section 11.1 of the LGIP and hence
6 SCE&G's contractual obligation to process Lily Solar's Interconnection request in
7 compliance with SCE&G's LGIP. Moreover, by tendering the nonconforming
8 interconnection agreement after promising to apply its LGIP to Lily Solar's request,
9 SCE&G breached its obligation to perform and to negotiate in good faith.

10 I am of the further opinion, that the draft LGIA, that SCE&G was required to
11 tender, would have been an enforceable contract. The LGIA would have effectively fixed
12 the essential terms of the Agreement. (1) The quantity of electricity that Lily Solar was
13 entitled to sell and SCE&G was obligated to buy, 70MW and (2) the price SCE&G was
14 obligated to pay, SCE&G's avoided cost. The LGIP does envision negotiation over the
15 terms of the draft appendices to the LGIA. That does not, however, render the draft
16 LGIA, a mere agreement to agree.

17 SCE&G attached appendices to the nonconforming interconnection agreement
18 that it tendered to Lily Solar. Had these appendices been attached to a LGIA, Lily Solar
19 would have accepted virtually all of the terms in the appendices that did not contradict
20 the terms of the LGIA. Moreover, any differences concerning the terms of the appendices
21 could have been resolved through good faith negotiation under Section 11.2 of SCE&G's
22 LGIP. Furthermore, in the event that negotiations over these terms reached an impasse,
23 Section 11.2 provides that Lily Solar could invoked the Dispute Resolution process set

1 forth in Section 13.5 of SCE&G's LGIP. Ultimately, a dispute submitted for resolution
2 under Section 13.5 can be resolved by arbitration. Under South Carolina Law this is
3 sufficient to preclude a finding that an agreement with open terms is an unenforceable
4 agreement to agree. See, Aperm of South Carolina v. Roof, 290 S.C. 442, 351 S.E.2d 171
5 (Ct. App. 1986). See also, Stevens and Wilkinson of South Carolina Ins., v. City of
6 Columbia, 409 S.C. 568, 579, 762 S.E.2d 696, 702 (2014), (analyzing and distinguishing
7 Aperm).

8 Had SCE&G honored its obligations to apply its LGIP, to tender a LGIA, and to
9 negotiate in good faith over any differences concerning the terms of the appendices, the
10 parties would have executed an interconnection agreement prior to the effective date of
11 the Directive imposing the revised South Carolina Interconnection Standard. As a result,
12 the interconnection agreement between Lily Solar and SCE&G would not have been
13 subject to the revised South Carolina Interconnection Standard. In my opinion, SCE&G's
14 breach of its contractual obligations and duty to negotiate in good faith, preclude SCE&G
15 from asserting that the adoption of the revised South Carolina Interconnection Standard
16 renders Lily Solar's claim moot. Moreover, under South Carolina Law, the parties'
17 failure to execute a contemplated formal interconnection agreement does not preclude the
18 existence of an enforceable contract. Sadighi v. Daghighfekr, 66 F. Supp 2d 752 (D. S.C.
19 1999); Tindall Corp. v. Mondelez International, Inc. 2015 WL 996847 (N.D. Ill.), (S.C.
20 Law).

1 I am of the further opinion that the doctrine of promissory estoppel obligates
2 SCE&G to tender a LGIA to Lily Solar. Lily Solar relied upon SCE&G's promise to
3 apply its LGIP under which SCE&G was required to tender a LGIA, by committing
4 substantial recourses to the project and foregoing opportunities develop other solar
5 projects.

6
7 **Q. DOES THAT CONCLUDE YOUR TESTIMONY?**

8 **A.** Yes.
9

EXHIBIT

“PTL-1”

PHILIP TOLBERT LACY

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I. Education

High School	Phillips Exeter Academy Exeter, NH Graduated 1965
Undergraduate	Duke University Durham, NC B.A. with distinction 1969
Law School	University of Virginia Charlottesville, VA LLB 1972 Notes Editor, <i>Virginia Law Review</i> Order of the Coif Raven Society

II. Employment

1972 – 1974	Associate Caplin & Drysdale Washington, DC
1974 – 1975	Visiting Assistant Professor University of Illinois School of Law Champaign – Urbana, Illinois
1975 – 1979	Assistant Professor University of South Carolina School of Law
1979 – 1980	Visiting Associate Professor University of Miami School of Law Coral Gables, Florida
1980 – 1990	Associate Professor University of South Carolina School of Law
1990 – August, 1991	Associate Dean for Administration and Associate Professor University of South Carolina School of Law
August 1991 – August 1992	Associate Dean for Administration and Professor University of South Carolina School of Law
August 1992 – December 2005	Associate Dean for Academic Affairs and Professor University of South Carolina School of Law

II. Employment (continued)

January 2006 – June 2006

Interim Dean and Professor
University of South Carolina School of Law

July 2006 – Present

Professor
University of South Carolina School of Law

III. Bar Admissions

Virginia 1972
District of Columbia 1973
South Carolina 1988

IV. Bar Positions

Chair, Commercial Law Committee
of the South Carolina Bar 1989-1991

Board of Governors, January 2006 – June 2006

V. Subjects Taught

Consumer Bankruptcy Clinic
Commercial Law
Contracts
Creditors' and Debtors' Rights I and II
Financial Crisis Seminar
Payment Systems
Sales
Secured Transactions

VI. Awards

1979 – Outstanding Faculty Member
University of South Carolina School of Law

1989 – Outstanding Faculty Publication – Book
University of South Carolina School of Law

1991 – Outstanding Faculty Publication –
Law Review Article
University of South Carolina School of Law

2007 – G.G. Dowling Award
University of South Carolina School of Law

VII. Law Reform

South Carolina Reporter – 2001
Revision of UCC Article 9
South Carolina Reporter – 2008
Revision of UCC Articles 3 & 4

VIII. Bar Review Lecturer

South Carolina Bar Review Course & BAR/BRI
South Carolina Bar Review Course lecturer on
UCC Articles 2, 3, 4, and 9
1985–Present

IX. Publications

1. Books

ALCES, HANSFORD, LACY, ANZIVINO, UNIFORM COMMERCIAL CODE TRANSACTIONS GUIDE: ANALYSIS AND FORMS (Callaghan Co., Deerfield, Illinois, 1988). A four volume treatise on structuring commercial agreements. I authored chapters 2–7, 9, and 10, which appear in Volume 1. These chapters cover Article 2.

ANNUAL CUMULATIVE SUPPLEMENTS, UNIFORM COMMERCIAL CODE TRANSACTIONS GUIDE: ANALYSIS AND FORMS, Chapters 2–7, 9, and 10 (1990-1993).

2. Articles

A Comment on Untangling The Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment by Allen C. Myers, 66 WASH. & LEE L. REV. 441 (2009).

Setoff and the Principle of Creditor Equality, 43 S.C. L. REV. 951 (1992).

Conflicting Security Interests in Inventory and Proceeds Under the Revised Article 9 of the Uniform Commercial Code, 41 S.C. L. REV. 247 (1990).

South Carolina's Statutory Exemptions and Consumer Bankruptcy, 30 S.C. L. REV. 643 (1979).

3. Bar Review Materials

Lacy, BAR/BRI Bar Review – South Carolina: Uniform Commercial Code Article 2 (BAR/BRI, March 2012).

Lacy, BAR/BRI Bar Review – South Carolina: Uniform Commercial Code Articles 3 and 4 (BAR/BRI, June 2012).

Lacy, BAR/BRI Bar Review – South Carolina Uniform Commercial Code Article 9 (BAR/BRI May 2012).

4. Other

South Carolina Reporter's Comments on the 2001 Revision to Article 9 of the Uniform Commercial Code

South Carolina Reporter's Comments on the 2008 Revision to Articles 3 and 4 of the Uniform Commercial Code